

# **PARALEGALS AND ADVICE OFFICES: PROGRESS AND CHALLENGES IN THE DEVELOPMENT OF ACCESS TO JUSTICE IN SOUTH AFRICA**

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## EXECUTIVE SUMMARY

The success of South Africa's ongoing transformation is predicated on its ability to deliver services to and improve the lives of its poor and predominantly black population. A key component of such change is the need to provide better access to justice to those who have been denied basic rights.

In the 1980s, during the height of political repression, organised resistance to apartheid stimulated the growth of advice offices and other paralegal services across the country. These institutions provided basic legal advice and assistance, facilitating access to remedies that were denied on the basis of ignorance and prejudice. For many South Africans these offices provided the only means of dealing with legal and social problems. There are between 250 and 300 offices currently in operation countrywide, many of which date back to that period.

Advice offices vary in size and capacity and deal with a variety of issues that differ from area to area. In general they fulfil three distinct and interrelated functions: a service role, a development role, and a human rights role.

In 1996, the National Community Based Paralegal Association (NCBPA) was founded. Supported by several international donors, principally the Swedish International Development Agency, the NCBPA has embarked on the difficult process of integrating advice offices and paralegal service providers within the broader legal framework in South Africa. In addition, the NCBPA acts as a conduit for funding for over 100 advice offices around the country, and is responsible for ensuring a range of advice office services for thousands of needy South Africans.

This report examines some of the key initiatives undertaken by the NCBPA, including the establishment of the National Paralegal Institute, the development of an accredited training curriculum, and the establishment of a national database and case-logging system. The report also examines the pressing concerns of funding and sustainability and points to several areas where further initiatives can be undertaken in this regard.

The report considers the prospects for the incorporation of the paralegal movement within broader state initiatives, to develop and enhance access to justice and human rights. In this regard, the report looks at recent developments within the legal aid system and explores the range of opportunities and challenges that have arisen as a result. The report examines the NCBPA's response to these developments and its efforts, in collaboration with other non-governmental organisations, to design a model for contracting paralegal services to the state, through what is known as the 'cluster model'.

The role of paralegal workers and advice offices has been regarded with a certain degree of support by the South African government, and by the Legal Aid Board – its primary agency for providing legal assistance to indigent persons. However, progress towards securing a future for

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paralegal work through government support has been limited. Funding through the state or its delivery agencies has not been secured. Consequently, the future of the advice office movement is precarious. There is a real danger that existing services will be cut back and many offices will be closed.

The future of the paralegal advice office movement and its transformation into a cohesive body that provides a comprehensive and professional service is therefore not guaranteed. While still operational, thanks to the support of international donors, such support is expected to be phased out over the next three to five years. The ability of the advice office movement to continue operating and providing legal services is consequently dependent on the emergence of a creative partnership between government and civil society. Without it, thousands of poor people will be deprived of an essential service, and the quest for developing access to justice in South Africa will suffer a serious setback.

## INTRODUCTION

The Community Agency for Social Enquiry (C A S E) was commissioned by the Charles Stewart Mott Foundation to examine the current situation regarding paralegal organisations (and in particular community-based paralegal organisations) and advice offices.

We explore in this report some of the key developments within the paralegal movement and the environment in which it operates, and look at the prospects for its incorporation within broader State initiatives to develop and enhance access to justice in South Africa. This report focuses on issues of access to justice, legal aid transformation, and the current challenges facing the paralegal movement in general and the National Community Based Paralegal Association (NCBPA) in particular.

In addition to work undertaken specifically for this study, we have drawn on two other research processes. First, an evaluation of the European Union Foundation for Human Rights' (EUFHR) programme for 1996-2000. This includes an assessment of their support to about 30 advice offices and other complementary programmes. Second, a review of the support of the Swedish International Development Agency (SIDA) to the NCBPA, legal service NGOs and the legal aid transformation process.

In these three processes a number of people have been interviewed, including representatives of the Ministry and Department of Justice, Legal Aid Board, NCBPA, National Paralegal Institute (NPI), legal aid back-up services, paralegal organisations, and advice offices. A list of people interviewed specifically for this research is contained in Annexure "A".

## BACKGROUND

Paralegal organisations have been working in South Africa for a number of decades. The oldest organisation providing paralegal service is the Legal Aid Bureau (now known as the Johannesburg Community Law Centre) established in 1937, and the Black Sash advice offices around the country. In the early 1980s, facing apartheid repressive policies, community organisations in many townships established community advice offices. They were assisted in their work by legal NGOs, such as Lawyers for Human Rights (LHR) and the Legal Resources Centre (LRC), which provided training, outreach services, and other specialised assistance.

Organised resistance to apartheid stimulated the growth of such advice offices across the country. Many survived on meagre contributions from the neighbourhoods they serviced, and could function only because of motivated volunteers. Many were linked to organised structures of resistance, particularly the United Democratic Front, established in 1983. For most black South Africans these offices provide the only available means of dealing with legal and social problems.

In the mid-to-late 1980s, LHR and LRC developed a stronger focus on their paralegal work. Several new organisations emerged, often with a clear focus such as training and development. These included the Legal Education Action Project (LEAP) based at the University of Cape Town and the Community Law Centre (CLC) based in Durban.<sup>1</sup> Other specialist organisations should also be mentioned, such as the Industrial Aid Society (established in the early 1980s) which focused on labour issues, and the Detainee Parent Support Committee, which provided families of detainees with assistance and advice. These support and back-up organisations operated across the country, but had limited capacity and were based in urban areas, and thus did not service a significant number of people in need.

Although the 1980s saw an unprecedented growth in the number of these services, by the end of the decade most community based advice offices were experiencing severe financial problems. The situation deteriorated further in the early 1990s, as the political context changed and many donors shifted their areas of interest and support.<sup>2</sup>

With the beginning of the political negotiations process in 1990, the opportunity to build up the paralegal and advice office movement presented itself. In July 1990, Penuell Maduna (at the time a senior official of the legal department of the ANC and currently the Minister of Justice), paid tribute to the vital role played by paralegal organisations in facilitating access, advice and support to poor people. Looking to the future, Maduna said that paralegal organisations “will be part and parcel of the building materials that we will use to construct a new society and develop a new legal system”. In addition, they “will help the people understand and protect their rights, freedoms and interests and make justice eventually accessible to the ordinary indigent person.”<sup>3</sup>

By 1994, however, there had been little progress towards this goal. Many advice offices, including well-established organisations such as the Legal Aid Bureau and Black Sash, were facing serious financial difficulties. Many offices closed down as a result, while others survived on the basis of community donations and voluntary work from the staff. Although funding was subsequently secured for a number of organisations and offices, it took two more years before the issue began to receive the attention of policy makers.

Although the new government that took power in 1994 was sympathetic to paralegals and advice offices, no specific attention was given to their role before 1997. The Justice Department was faced with a range of critical problems within the administration of justice, and legal aid received no priority. On the more positive side, the same period saw the paralegal movement beginning to recover from the funding drought. In 1996 the NCBPA held its founding national conference.

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<sup>1</sup> “An investigation into paralegals and the ladder system of legal education and practice” – Subcommittee of the Access Continuation Committee, April 1994, pp. 15-16.

<sup>2</sup> *ibid.* p.16.

<sup>3</sup> Keynote address at conference entitled ‘Working for Justice - the role of paralegals in South Africa’, convened by the Black Sash and the Legal Education Action Programme, at the University of Cape Town, July 1990.

The creation of this umbrella body facilitated the difficult process of integrating advice offices and paralegal organisations within the broader framework of developing access to justice.

## DEVELOPMENT OF THE PARALEGAL MOVEMENT

### Definitions

Paralegal organisations and advice offices provide different types of services, and there are different types of paralegal organisations, including:

- Advice office worker – a (lay) person who provides free legal advice and other forms of assistance to members of the public.
- The ‘barefoot’ lawyer – the legal equivalent of the primary health care worker, working mainly in rural areas where there are few or no lawyers.
- The law practise paralegal – a paralegal who principally works with/under the supervision of an attorney.
- Professional paralegal – a paralegal who practises independently for his/her own account.<sup>4</sup>

In its submission to the Legal Transformation Forum, the National Paralegal Institute (NPI) of South Africa suggests the following definition to be incorporated into the envisaged Legal Practitioners’ Act:

“A person qualified through education, training, or work experience to perform legal, social welfare or related work, which require a basic knowledge of the law. The person may be community based, employed by a legal practitioner, a law firm, governmental institution, non-governmental organisations, corporation or any other entity and may be supervised by, or work under a legal practitioner in performing the work.”<sup>5</sup>

This definition does explicitly include a range of services traditionally provided by advice offices, such as human rights education and conflict resolution. By way of comparison the definition contained in the “Paralegal Training Manual for Africa” addresses the traditional role played by advice offices and provides a link between the paralegals and the rest of the legal profession. Here a paralegal is defined as:

“A community-based person who possesses the basic knowledge of law and its procedures and has the necessary motivation, attitudes and skills to:

- Conduct educational programmes to bring disadvantaged people to the awareness of their rights;
- Facilitate the development of people’s organisations to enable them to demand their rights;
- Give advice and help solve basic legal and social welfare problems;
- Assist in securing mediation and reconciliation in matters of dispute;
- Conduct preliminary investigations in cases which need to be referred to a lawyer;

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<sup>4</sup> *ibid.* pp. 13-14.

<sup>5</sup> Position Paper on the Recognition and Regulation of the Practice of Paralegals in South Africa, NPI, 11/99.



- Assist the lawyer with written statements, required evidence and other information relevant to the case.”<sup>6</sup>

There are other definitions, but in the context of the community based advice office movement in South Africa, the consensus is that advice office workers evolve into paralegals. The point at which this transition is made is debatable. Most paralegals in South Africa work without the supervision of an attorney, and usually they do not need professional assistance in many of the areas in which they are currently involved.

### Spread of advice offices

In 1994 Lawyers for Human Rights estimated that there were approximately 1200 paralegals in 400 organisations and projects across the country. The NCBPA list of advice offices includes over 350 advice offices, not all of which are registered members of the Association, and in many instances the NCBPA has only sketchy details of the offices. Although the number of functioning offices is now believed to be lower (between 250 and 300 offices), the provincial breakdown of the NCBPA list illustrates a disproportionate spread of offices, and presumably of services as well:

Eastern Cape	77
Gauteng	29
KwaZulu-Natal	106
Mpumalanga	11
Northern Cape	1
Northern Province	14
North West	23
Western Cape	65
Free State	26
<b>Total</b>	<b>352</b>

### The Role of Paralegals

In September 1992 LEAP, at the University of Cape Town, identified three main roles played by advice offices and paralegals:

- Service role
- Development role
- Human rights role

<sup>6</sup> “A Paralegal Trainer’s Manual for Africa”, Amy Tsanga & Olatokunbo Ige, International Commission of Jurists. Geneva, 1994, p. 14.

### *Service role*

Paralegals serve the community by responding to day to day problems such as maintenance, eviction, pensions, and violence against women. There are four parts to this role:

- Giving advice: giving people information and advice on a range of legal and social welfare issues
- Counselling: listening to people's personal, legal and social welfare problems, and giving them support
- Referral: sending people to other agencies and services for more specialised help
- Networking: working together and sharing resources with other organisations and agencies.<sup>7</sup>

### *Advice giving*

Paralegals offer free advice on legal and other matters for people who cannot afford a lawyer. For many indigent South Africans, paralegals and advice offices are the first 'port of call' when seeking assistance. Paralegals influence what action is or should be taken, and play a pivotal role in determining how a matter is handled. They provide advice on a range of issues, which vary from area to area according to needs and capacity. The bulk of assistance seems to be dealing with labour matters, social welfare, state administrative issues, and family matters.

### *Counselling*

Although few paralegals have formal counselling skills, this role is an integral part of community based advice office work. Advice offices provide an essential pillar of support and encouragement within communities, sometimes in collaboration with local churches.

### *Referral*

Although advice offices usually try to resolve matters 'in house', many of the issues brought to them require a referral elsewhere. Depending on the nature of the matter, clients are referred to certain state institutions and service organisations, often with some documentation setting out precisely what assistance is required. This service has proven to be effective in many areas, as civil servants may be more helpful when they know that the person seeking their assistance has alternative remedies. Advice offices have been acting as an essential conduit and point of access to both government and non-governmental services.

For legal assistance, clients are referred to lawyers as well as to the Legal Aid Board. Advice offices can provide an effective screening mechanism to prevent the unnecessary use of precious litigation resources. Advice offices in the Community Law and Rural Development Centre (CLRDC) network, for example, use attorneys that take matters on a pro bono basis. Careful screening by the offices has resulted in 90% of these matters being resolved favourably.<sup>8</sup> Advice offices also refer and show people how to use the Small Claims Court, where it is available.

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<sup>7</sup> "Community Advice Services & Para-legals", Derrick Fine, Social Justice Resource Project & Legal Education Action Project, Institute of Criminology, University of Cape Town, 1993, p. 6.

<sup>8</sup> Interview with CLRDC staff, 11 May 2000.

Advice offices have made use of statutory human rights bodies (South African Human Rights Commission, Commission for Gender Equality and the Public Protector). These institutions have a limited capacity to handle individual cases and, to avoid being overwhelmed by the volume of matters, require organisations such as advice offices to act as an effective filter of cases.

### *Networking*

Advice offices have traditionally networked through formal and informal contacts. Many offices, however, have no budget to facilitate these processes and rely on informal contacts. This situation has improved with the formation of the NCBPA, but there is a considerable room for improvements in this area. Many advice offices remain unaware of various developments and processes, both within the movement and the broader policy environment.

### *Development Role*

Through close contact with the communities they serve and an awareness of community needs and concerns, paralegals can help build services and resources that improve the lives of people and give them more power and control over their own lives. This can happen in four ways:

- Building community resources: helping to develop organisations, services and resources in under-served communities
- Community education: running community workshops to inform people of their rights and on other relevant issues
- Skills training: running training programmes and in-service training for new paralegals in legal, administrative and community education skills
- Policy formulation: helping to develop future policy on access to justice, social welfare and related issues.<sup>9</sup>

### *Building community resources*

Through collaborative agreements with legal back-up and other service organisations, advice offices have been able to send people for training through CLRDC and the Black Sash. Others have benefited from workshops provided by organisations such as Lawyers for Human Rights, the Legal Resources Centre and NIPILAR. Organisational development has also been made possible with the assistance of these organisations and through the donor community.

Strategies have been employed in some parts of the country by offices to tackle service provision. In KwaZulu-Natal, for example, the CLRDC network influenced the Department of Welfare and Population Development to establish regional offices, in response to problems with pension payments to the elderly and disabled. This has resulted in a more effective service from the department.

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<sup>9</sup> “Community Advice Services & Para-legals”, Derrick Fine, op cit. p. 7.

*Community education, awareness and information-spreading*

Advice offices have played and continue to play a pivotal role in the field of community education and awareness, including voter education workshops before the national elections. Since 1996 advice offices supported by the European Union Foundation for Human Rights have been running workshops on a range of rights-related issues (HIV, labour, disability, children, women, land, etc).

Levels of human rights knowledge and awareness remain limited, particularly in rural communities and other marginalised groups. Research indicates that there is considerable work to be done in this area.<sup>10</sup> This situation is compounded by the ongoing development of legislation grounded in the new constitutional dispensation, covering a wide-range of issues traditionally handled by advice offices (labour, domestic issues, social security).

Although community awareness and education programmes run by advice offices are supported in different parts of the country, the capacity and potential of the movement in this area of work has not been realised. Most of these endeavours aim to reach marginalised communities through workshops. Some offices have also tried (with varying degrees of success) to use print and broadcast media and other targeted interventions for educational purposes. The Lesedi clinic, in the North West province, has developed close relations with certain local and provincial government structures and has been contracted to provide training for local government officials.

*Skills Training*

A smaller number of better resourced advice offices provide in-house skills development and training to their own staff, volunteers and interns. Although their capacity is limited, advice offices have a tradition of development in this area.

*Policy Formulation*

By and large, most advice offices have not been involved directly in policy formulation, although they often contribute to broader initiatives of lobbying and advocacy.

***Human rights role***

Human rights are the core business of advice office work. The central objectives of paralegals and advice office workers are "to make people, especially marginalised people, aware of their rights, to provide information how and where to exercise those rights, to provide other information which might be useful in claiming rights, (and) to ensure that people are treated correctly in claiming their rights."<sup>11</sup>

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<sup>10</sup> "Assessing levels of human rights awareness amongst the general population and specified target groups", Piers Pigou, Ran Greenstein and Nahla Valji, C A S E, November 1998.

<sup>11</sup> "Objectives of the Advice Office Programme" - Evaluation of Black Sash Advice Offices - Part 1, Debbie Budlender, C A S E, June 1994.

According to LEAP, there are four ways in which paralegals can help to build a culture of human rights:

- Monitoring: assisting in documenting and monitoring of political violence, the conduct of the police, registration and voting in elections, etc
- Publicising: ensuring that violations of human rights and other issues affecting isolated communities are highlighted
- Campaigning: assisting with resources and planning for campaigns to improve conditions and services in under-served communities
- Mediating and negotiating: helping to resolve local and regional conflicts through mediation and negotiation.<sup>12</sup>

### *Monitoring*

The levels and sophistication of monitoring initiatives vary considerably. Advice offices have played an important role in identifying and documenting human rights violations and other abuses, and are well placed to continue playing this role, though most of them do not have monitoring systems. Although this does not necessarily take away from their effectiveness, there is room for the development of more effective and efficient systems, which in turn can inform campaigns and other initiatives.

### *Publicising and campaigning*

Several advice offices have been involved in campaigns at national level. The Black Sash have undertaken a range of campaigns, on issues such as domestic workers, old age pensions, child support grants, customary marriage, Workmen's Compensation, the Unemployment Insurance Fund, disability grants, access to credit for the poor, etc. The Black Sash was also instrumental in the 1998 Poverty Hearings, and was responsible for convening the social security hearings in the Eastern Cape. Many of these campaigns have resulted in the production of booklets, and the Black Sash distribution network saw them distributing over half a million booklets as part of their voter education campaign in the run up to the 1994 general elections.

Individual advice offices have taken up issues with national implications. The Lesedi advice office, for example, brought the issue of racism in Vryburg schools to the attention of the public and of the Human Rights Commission in 1998. The Lesedi office, in conjunction with the Legal Resources Centre was also responsible for the successful legal challenge on the constitutionality of Section 49 (2) of the Criminal Procedures Act, which sets out the circumstances in which the police can use lethal force.

### *Mediating and negotiating*

As mentioned above, advice offices will frequently seek solutions that do not involve litigation. Their objective is to facilitate solutions in a cost-effective manner. During 1999, for example, the CLRDC network of advice offices recovered R2.5 million for its clients without litigation.

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<sup>12</sup> "Community Advice Services & Para-legals", Derrick Fine, op cit. p. 8.

As can be seen from the above, these three inter-related roles address a range of personal, social and economic issues. In the context of the Constitution, Bill of Rights and new rights-based legislation, the role of paralegals and advice offices has also become increasingly intricate. The programmes, initiatives and efforts of the paralegal movement, and of individual workers, vary from office to office, depending on their capacity, personnel and physical resources.

Although there has been no comprehensive evaluation of the paralegal movement to date, several studies and evaluations of specific offices have been conducted. This provides us with an insight into the broad range of activities that are being undertaken, as well as the possibilities that such projects have been or could be replicated and developed elsewhere.

Offices provide a variety of services and in some instances can handle complex and intricate matters. However, there are examples of offices routinely referring matters to specialist organisations, even though they have received training from those organisations on how to handle those particular matters. Capacity, attitude and initiative vary from office to office, but they all share a client profile that is poor and black, with many who are unemployed and in need of state welfare assistance.

Many advice offices have taken steps to address concerns that have not necessarily been brought to them in the form of complaints. Their proximity to communities prompted several offices, for example, to take action to empower women and to address gender related concerns. In addition, a significant number of women play a major role in the management, co-ordination and administration of advice offices.

Caseloads vary considerably from office to office, with some organisations having more clients than they can deal with, and others apparently under-utilised. Concerns of under-utilisation have led the CLRDC to initiate a pilot scheme to develop two advice offices in its network into resource centres. Several interviewees see this kind of development as a necessary return to the 'one-stop' assistance centres that emerged in the 1980s. While the principles may be similar, service provision now calls for a more comprehensive and consolidated approach. As mentioned above, advice offices are the primary source of legal assistance and point of contact in many communities. They must be equipped to provide assistance and advice on a broad range of issues affecting the community, especially within the new constitutional dispensation.

### ***Different types of advice offices***

Outside of the NCBPA, which is discussed below, other advice offices operate as part of a broader network or, as in the case of the Black Sash, as constituent parts of one organisation.

#### ***The Black Sash***

The Black Sash advice office service operates from nine regional offices across the country. These offices are mainly urban based. Most of the offices have developed different operational

systems (filing, administration, monitoring), as a result of operating under differing conditions, and individual inputs and preferences. In recent years Black Sash offices have increasingly developed a more standardised approach.

These offices are regarded in many quarters as an elite group, not only because of their long history and being relatively well-resourced, but because they are well administered and managed, focused and effective. They have been able to translate their day to day work into broader thematic campaigns, particularly around issues relating to social security, labour and marital issues.<sup>13</sup> In addition, the Johannesburg Black Sash office offers two four-month paralegal training courses to trainees put forward by organised community structures.

#### *The Community Law and Rural Development Centre (CLRDC)*

The CLRDC, based in Durban, has been instrumental in developing a rural network of 59 advice offices in rural communities in KwaZulu-Natal. The CLRDC provides support for core costs and salaries of 90 paralegals. Their education and training programmes are “designed to provide communities with viable structures through which training and information can be disseminated, and to contribute to the capacity building of communities, thereby enabling them to spearhead their own development.”

The CLRDC has been instrumental in developing ‘paralegal committees’, which “facilitate, manage and monitor the implementation of CLRDC projects at community level.” These projects include education and awareness raising initiatives, publications and workshops, community development initiatives, and facilitating the implementation of government programmes and legal reform initiatives. These grassroots programmes are complemented by CLRDC networking to lobby, develop and implement responsive human rights policies.<sup>14</sup>

#### *National Institute for Public Interest Law and Research (NIPILAR)*

Based in Pretoria, NIPILAR is a conduit for funding to a number of community based advice offices around the country. At its peak it supported over 45 offices. This has been reduced to 16 offices, most of which receive limited funding through the USAID democracy and governance programme.

NIPILAR has used its advice offices to develop a paralegal training manual, and it relies on case material and other information to inform some of its research processes. It has also utilised these offices to gather statistical data regarding levels of human rights knowledge and awareness.

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<sup>13</sup> “Objectives of the Advice Office Programme” - Evaluation of Black Sash Advice Offices – Part 1, Debbie Budlender, C A S E, June 1994.

<sup>14</sup> Community Law and Rural Development Centre – Annual Report, September 1997 – December 1998, p. 4.



### **The National Community Based Paralegal Association (NCBPA)**

For over a decade, members of the advice office and paralegal movement have striven to secure a professional future for a range of individuals and organisations, working to protect, promote and fulfil human rights. In the early 1990s, paralegals from a number of organisations recognised that their future development and opportunities rested on the need to construct a coherent structure that would represent the interests and views of its membership. In addition, such a structure would provide the government and other potential partners with a contact point that was representative of advice offices and paralegals throughout the country.

The NCBPA was established in 1996 as a network of nine provincial paralegal associations, whose membership is drawn from regional structures and individual community based advice offices and paralegals. The objectives of the Association are:

- To serve as a voice for affiliate advice offices on all policy matters, through its engagement with the government, donors and civil society structures
- To lobby national, provincial and local government to recognise the valuable role that is played by paralegals in society, with a focus on poor and marginalised communities
- To establish a Trust and engage in other resource-generating initiatives, as a basis for organisational sustainability
- To develop uniform standards and certified training that will enhance the service delivery and professional competence of paralegals
- To demystify the law by simplifying the Constitution, Bill of Rights and other statutes at public outreach workshops and other formal training forums
- To set up a code of conduct and ethics that will direct the provision and quality of professional service to communities.<sup>15</sup>

The NCBPA operated without any funding, from its inception until May 1998, when it received its first grant from its primary sponsor, the Swedish International Development Agency (SIDA) through the International Committee of Jurists – Swedish Section (ICJ-S). The national office is based in Braamfontein and has five permanent staff positions. It is supervised by a National Executive Committee, which is vested with management responsibilities. Nine provincial offices co-ordinate planning and programme implementation, and each office has two staff members. They function as a link between the national office and individual advice offices. Their capacity to deliver on this mandate, however, is severely hampered by inadequate funding.

The bulk of SIDA funding goes towards the running costs of over 120 advice offices around the country. Funding was initially routed through Lawyers for Human Rights, and is now the responsibility of the NCBPA with the support of an independent firm of Chartered Accountants – Douglas & Velcich. This arrangement is working well and a recent review by Price, Waterhouse, Coopers confirms the NCBPA's capacity to manage considerable amounts of funds.

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<sup>15</sup> Annual Narrative Report of the NCBPA – January-December 1999, p. 1.



The NCBPA has embarked on a number of processes to realise the key objectives of making the sector more professional, and creating the basis for state support for the continued operations of its members.

### ***Database and case-logging***

Advice offices process large amounts of primary data. Some of the better-resourced organisations, such as the Black Sash, have been able to utilise these data to conduct research into problems illuminated by cases and disseminate information around specific problems. Most advice offices, however, have not (yet) generated data that could be used in this way. The use of primary data to lobby, campaign and otherwise exert pressure for changes to laws and delivery has therefore been limited in the broader movement.

A properly established database is a prerequisite for the co-ordination and administration of advice offices, and the potential of effective utilisation of primary data has not been lost on the NCBPA, which has focused considerable energy on the establishment and development of a case-logging system.

Despite several delays in establishing the NCBPA's database, it is now up and running. Training in database management has been conducted in all the provinces, and the logging of cases by offices funded by SIDA/ICJ-S, began in April 2000. The data generated by the paralegal movement will be a powerful instrument in policy debates, and enable it to show what types and volume of work it handles, thereby demonstrating with facts and figures why advice offices should be supported. It will also assist in providing cost calculations for the specific services provided, and influence the debate regarding the technical feasibility of such services.

The process of data inputting has various levels of quality control, which facilitates its utilisation as a reliable information tool. The database provides a valuable tool in monitoring productivity and the trends in the kind of issues that advice offices are dealing with. At this stage only the offices funded by SIDA/ICJ-S have begun to contribute to the NCBPA case-logging process. As mentioned above, other advice offices also generate similar statistics and data sets, and consideration should be given to merging these initiatives.

### ***National Paralegal Institute (NPI)***

The NPI was established in April 1999 as a project of the NCBPA, with funding from the European Union Foundation for Human Rights. Its aim is to “ensure paralegals have the necessary knowledge and skills to enable them to provide competent and professional service in an environment that accords them formal recognition.”<sup>16</sup> The key objectives of the NPI are:

- To conduct training needs assessment relevant to the work of paralegals
- To develop uniform curriculum and material for paralegal training

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<sup>16</sup> Mission statement of the NPI.

- To accredit and certify paralegal training courses and trainers
- To develop and enforce a code of ethics for licensed paralegals
- To lobby for formal legal status of paralegal work
- To network with other institutions working in the sector or related sectors
- To ensure (financial) sustainability of the Institute

With regards to the above, the NPI has made significant (albeit slow) progress, and established a number of sub-committees to address: curriculum development and training; certification and accreditation; ethics and complaints, and; legislation and the definition of a paralegal.

### *Training*

The development of paralegal training was recognised as a core concern in the 1980s. In October 1991 an Access Conference brought together various organisations involved in the practice of law and the administration of justice. The Conference decided that urgent attention should be given to the question of a ‘ladder system’ for paralegals to gain access to the legal profession, and the related questions of recognition, application and training.<sup>17</sup>

Training is provided by a number of NGOs and academic institutions. The sector has been traditionally weak, as evidenced by unsuccessful initiatives to establish a network of training and support organisations in the mid-1990s. Informal networking continued and was an important part of influencing the NCBPA’s decision to launch the NPI.

The NPI with the Rand Afrikaans University is currently running a one-year distance learning training programme on labour law, attended by 45 paralegals from various provinces. After being trained they will train other paralegals across the country. Both the NPI and NCBPA favour a ‘training the trainer’ approach as shown the latter’s recently launched paralegal training programme on children’s rights.

The NPI has focused considerable attention on the development of a two-year diploma course that will be accredited and provide the basis for formal recognition. Progress has been made in relation to the pilot training scheme, which will be conducted and evaluated before September 2000. The limited funding available has meant that the four-month process originally envisaged will now be condensed into a period of two weeks.

The intention is to develop a three-level training programme. The diploma course will be pitched at a considerably higher level than the training offered by organisations such as the Black Sash, NIPILAR and LHR, and is intended to provide an accredited path that will bring together paralegal and traditional legal qualifications. A wide range of actors within the legal and NGO community support this development. Advice offices have been plagued by a high staff turnover,

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<sup>17</sup> “An investigation into paralegals and the ladder system of legal education and practice” – Subcommittee of the Access Continuation Committee, April 1994, p. 3.

as skilled and qualified people seek work elsewhere once they reach the ceiling imposed by current limitations within the paralegal framework. The envisaged programme will contribute to staff stabilisation and retention by offering a career path within the paralegal movement.

The NPI and NCBPA acknowledge that more must be done to standardise and accredit 'traditional' training. Even at the level of baseline knowledge and skills, considerable differences exist between paralegal workers and offices. There is some concern that unless an even spread of baseline knowledge is secured, the development of 'paralegal professionals' (with the envisaged diploma) will entrench uneven levels of skills and capacity. There is also concern that training materials have not been properly assessed for their relevance to actual work requirements.

### *Skills Audit*

The NPI informed C A S E that it had completed a skills audit of all its advice offices, with a view to identifying existing skills and determining where and what training is required. At the time of writing the skills audit report was still incomplete. It appears that a large number of paralegals had not presented any data, thus preventing the report from providing a basis for assessing needs and for planning the necessary training programmes. Several interviewees felt that the skills audit process was methodologically unsound and thus of little value. Serious consideration should be given to locating funds for an independent audit.

### *Code of Ethics*

Although the NPI has established a committee to oversee and guide the development of a code of ethics for the paralegal movement, not much progress has been witnessed in this regard. Several critics have pointed to the absence of the code as a reason for not being able to establish closer working relations with the movement. The lack of a code also appears to inhibit the NCBPA's ability to sanction the behaviour of errant and negative elements within the movement.

### *Legislation*

As discussed in more detail below, the Department of Justice is currently preparing an Act that will incorporate all legal practitioners into a common framework. The NPI, like other interested parties, has fed its comments into the process. Due to limited funding, the NPI was forced to conduct its consultation process with paralegals as part of the NCBPA case-logging training sessions. This was regarded as inadequate, and there was some concern that the NPI's position had not been adequately informed by the membership.

### *NPI funding*

Although EUFHR funding to the NPI was extended until September 2000, it is evident that without additional funding these critical areas of development will be suspended. This would further hamper the NCBPA ability to meet its objectives, which in turn would have serious consequences for the overall paralegal movement. Given the limited capacity of the NCBPA,

Several interviewees recommended that the NPI no longer remain under the auspices of the NCBPA and be constituted as a separate body.

#### *Relationship with legal back-up and support services*

Advice offices have traditionally relied on a range of support services. Most support services have limited capacity and cannot address needs adequately, particularly in rural areas. Legal back-up services are provided in the main by University Law Clinics (under the umbrella of the Association of University Legal Aid Institutions – AULAI), the Legal Resources Centre and Lawyers for Human Rights, though these are restricted in their geographical reach. During 1999 the NCBPA held a series of workshops to develop formal working relationships with support agencies, resulting in formal relations between individual advice offices and university law clinics in some parts of the country.

The extent to which advice offices are aware of available support from legal and other support services is not clear. The NCBPA does not have a comprehensive overview of which offices receive support and what type of support, and it is difficult to assess where there is greatest need to develop such services.

#### *NCBPA and the development of the Cluster model*

During the second half of 1999, the NCBPA was instrumental in developing the ‘cluster model’ of legal aid service delivery<sup>18</sup>, which provides for a variety of contractual relations within and between advice offices, law clinics, legal NGOs and the Legal Aid Board.

The ICJ-S has thrown its weight behind this model and is currently paying for a co-ordinator, responsible for developing area service provider profiles and for cluster development. It is envisaged that between three and five clusters will be developed during a pilot phase that will be operational by September 2000, and that an evaluation of these clusters will lead to the development of proposals to be presented to the LAB in the first quarter of 2001.

This is an ambitious project, the success of which will depend on the co-operation and commitment of the partner organisations involved. If the pilot process is successful, the model could be adapted to other parts of the country. Specific attention must be given, however, to areas where advice offices do not have the benefit of legal back-up services.

The model proposed is flexible, and it would allow different arrangements within a collaborative framework. One model could comprise a university law clinic or LHR office as the nucleus of the cluster, with specific services provided by advice offices in a particular location. Another variation could allow envisaged LAB Justice Centres to work in concert with advice offices within a particular area. Centres would develop close links with regional clusters of

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<sup>18</sup> “Extract of the New Legal Aid System – The advice office / law clinic concept” prepared by NCBPA, AULAI, LAB, LHR & LRC – November 1999.

organisations and the LAB would contract NGOs, advice offices, etc to provide certain services on the basis of an agreed fee structure, subject to certain controls.

### *Other projects*

The NCBPA has been involved in several other projects. The Constitution and Bill of Rights Project is a joint initiative with LHR, funded by the Charles Stewart Mott Foundation and by Interfund. The Project has developed work plans and training materials, and has conducted training at provincial and national levels.

The Access to Justice Paralegal Training Project is a joint project with LHR funded by KFS, an Austrian donor. The project focuses on capacity building of advice offices at several levels, and addresses a range of issues, including administration, management, and human rights education.

The Children's Rights Project is a new NCBPA project funded by Radda Barnen. In the first phase of the project to begin in August 2000, a core team of paralegals from each province will receive training. It is hoped that further funding will enable the NCBPA to take this pilot phase forward. Trainers are expected to train other paralegals from the provinces, who will in turn provide training for and workshops with the communities they work with.

### **Policy and legislative developments**

The 1996 South African Constitution entrenches equality before the law and incorporates a range of social and economic rights regarded as central to the eradication of poverty and inequality. The State was specifically instructed in Section 7(2) of the Bill of Rights to "respect, protect, promote and fulfil the rights in the Bill of Rights".

Although constitutional guarantees of assistance and legal representation were limited to certain areas, such as the defence of those accused with criminal offences and other vulnerable groups such as children, it was recognised that additional services were required. Many of these services were already being provided in parts of the country by advice offices and paralegals, though on a precarious basis, particularly in an environment that saw the diversion of funding from civil society to the newly elected democratic government.

After the 1994 elections the Department of Justice initiated a major overhaul of the administration of justice. A Planning and Policy Unit within the department was established and given responsibility for the production of a strategic plan for the transformation of the administration of justice. The Justice Vision 2000 is a five-year plan, which was launched in September 1997 and covers the period 1997 to 2002. Although no specific reference was made to paralegals or advice offices, the Plan focused on a number of areas (improving access to justice and transforming the legal profession) where paralegals would be of critical importance.<sup>19</sup>

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<sup>19</sup> "Justice Vision 2000 – Executive Summary" – <http://www.doj.gov.za/docs/policy/jv2000 – summ.html>.

The Legal Aid Board (LAB) was seen by many as the appropriate vehicle to develop and enhance access to justice. The LAB, however, was already facing severe financial crisis, as costs and contingent liabilities continued to grow at an alarming rate. It was evident that the legal aid system (regarded by many as corrupt and illegitimate) was in need of transformation.

In January 1998 the Department of Justice hosted a National Consultative Forum on Legal Aid. The Forum's goal was to review the existing structures and consult stakeholders about economically sustainable policies, which would make access to justice for all a reality. The Forum reached broad consensus on a number of issues. This included the need to develop and support the delivery of services "through legal aid centres, clinics and advice offices in which lawyers and paralegals will provide public defender services in criminal matters and an appropriate range of services in civil matters, including mediation services."<sup>20</sup>

The Forum broke into a number of Working Commissions, which developed a series of recommendations. One of the Commissions, which dealt with "Short-term improvements to the present system of legal aid", made recommendations on how to enhance delivery of services in rural areas. It stated that "legal aid should not be confined to legal representation, but should include legal advice and assistance which should be done primarily through advice offices."<sup>21</sup> Another Commission, which looked into the "Structure of (the legal aid) delivery system", recommended that the concept of legal aid should include four elements:

- Legal advice and information
- Litigation
- Representation in other forms of dispute resolution, and
- Education and training.<sup>22</sup>

In line with the need to reduce expenses and to develop alternative models of delivery, this Commission recommended that the new structure should be a two stage model similar to that suggested by the NCBPA, which favoured a bottom-up model for the delivery of legal aid services. Stage one would include information and advice at community level, and stage two would include referral to legal services for representation.

At community level the new legal aid structure should:

- Build on the infrastructure of the existing 350 advice centres in the country
- Empower advice offices by including paralegals and Street Law trainers to provide an educational component
- Empower advice offices by including some professional lawyers and candidate attorneys

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<sup>20</sup> "The Minister of Justice's Statement, post the 15-17 January 1998 National Legal Aid Forum".

<sup>21</sup> "National Legal Aid Forum, Kempton Park, 15-17 January 1998: Working Commission Recommendations" – David McQuoid-Mason, *South African Journal of Criminal Justice*, 1999, Vol. 12, p. 49.

<sup>22</sup> *ibid.* p.52.

- Encourage the use of alternative dispute resolution to resolve disputes, and
- Deal with the preliminary issues where people require representation, and refer them to networks of lawyers or legal service organisations if disputes cannot be resolved.

In terms of case referral it was recommended that if disputes could not be resolved during the first stage, the community advice offices should refer clients to:

- Law clinics, public defenders, Judicare, etc, or
- Community legal services centres or legal aid centres.

This was a remarkable step forward and provided the paralegal movement with a broad framework with which to develop its own programmes. Following the conference, the Ministry of Justice appointed a Legal Aid Transformation Task Team (LATT) to assist the LAB with “the introduction of a new (legal aid) system while the old system is phased out, and to promote transformation within the Legal Aid Board.”<sup>23</sup>

In November 1998, following the formation of a new Board (including for the first time paralegal representation), the LATT presented its report and recommendations. Building on the outcome of the Legal Aid Forum, the LATT recommended the development of an “integrated, inclusive, flexible and multi-pronged approach to deliver legal aid and services”, and that the delivery system “should combine public, private and community-based delivery systems, that adapt to specific needs in different areas.”<sup>24</sup>

The LATT emphasised the importance of a “needs-based approach ... with a view to creating equity of distribution of services between urban, peri-urban and rural areas.” Legal aid, they argued, was an important (potential) mechanism for enforcing and protecting civil and political rights, and for promoting the delivery of socio-economic rights in order to deal with poverty eradication.<sup>25</sup>

The LATT recommended that the Judicare system be phased out gradually and replaced by services from a national infrastructure of Justice Centres and existing legal service providers. Paralegals and advice offices would be integrated into the work of the service delivery systems – justice centres, public defenders, Board clinics, university-based clinics, private practitioners, public interest law and human rights NGOs, and the proposed mobile unit legal services.

The LATT realised that advice services could not be supported entirely by the LAB and that they “need to reach clear contractual arrangements for co-operative service delivery with other service providers.”<sup>26</sup> Determining what role paralegals would play and what services they would provide was largely dependent on what areas of work legal aid would address. Building on recommendations made at the Forum for a review of the Legal Aid Guide, LATT recommended

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<sup>23</sup> “The Minister of Justice’s Statement, post the 15-17 January 1998 National Legal Aid Forum”.

<sup>24</sup> “Report and Recommendations of LATT to the LAB” 21 November 1998, p. 2.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.* p. 9.



that services be extended beyond civil and criminal litigation to include mediation, arbitration, negotiation, advice, education (including a street law component), and training.

Significantly the LATT also pointed out that “most paralegal advice offices are currently funded by private donor funds and will require direct support from the government in two years time.”<sup>27</sup> Following this report the LATT effectively ceased to function. Responsibility for specific policy development now rested squarely on the shoulders of the LAB.

In a further development in December 1998, the government unveiled its National Action Plan (NAP) for the promotion and Protection of Human Rights. The NAP is an integral part of government's efforts and commitment to overcoming the apartheid legacy of poverty and social injustice. The plan emphasises the importance of enhancing access to justice and acknowledged the agreements made at the National Legal Aid Forum, arguing that the definition of legal aid should be broadened to include:

- Giving advice by paralegal workers
- Providing legal aid for alternative dispute resolution
- Promoting an awareness of human rights
- Preventative legal education.<sup>28</sup>

In terms of the broader brushstrokes of policy development, advice offices and paralegals were again affirmed as an integral part of future legal aid developments. From the viewpoint of the paralegal movement, and in the context of the limited period in which donor support was expected to continue, there was an urgent need to expedite the legal aid transformation process. Transformation, however, was largely dependent on the Legal Aid Board.

With the exception of proposed legislation (discussed below), no policy regarding the role of paralegals in improving access to justice has been formulated. Discussions with officials from the Department of Justice reveal that little attention has been given to the broader development and welfare role that paralegals play. The Department can play a pivotal role in facilitating an interdepartmental policy in this regard. The Delegation of the European Commission in South Africa has proposed to Brussels that it will support the development of this policy, as part of its broader support for the Department of Justice in its next funding cycle.<sup>29</sup>

## THE LEGAL AID BOARD AND THE TRANSFORMATION OF LEGAL AID

The Legal Aid Board has been the main vehicle for the delivery of legal aid services in South Africa for three decades. In its early years it focused mainly on civil matters such as divorces and personal injury claims. Although legal representation was provided at State expense in serious

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<sup>27</sup> *ibid.* p. 9.

<sup>28</sup> “The National Action Plan for the Promotion and Protection of Human Rights” – December 1998, p. 65.

<sup>29</sup> Discussions at evaluation of the European Union Foundation for Human Rights – 23 May 2000.



criminal matters, the vast majority of those accused with criminal offences were not represented in court. It was not until 1994 that the LAB was contracted on behalf of the State to deliver legal services in criminal cases as required by the Constitution. Consequently expenditure began to increase rapidly. The 1990 budget allocated R21.9 million for legal aid. By 1994 this had increased to R66.5 million.<sup>30</sup> Expenditure subsequently rose from R94.3 million in 1995/96 to nearly R280 million in 1999/2000.<sup>31</sup>

Since 1994 the LAB requested to underwrite the costs of legal representation in matters relating to the Truth and Reconciliation Commission, the restitution of land rights, labour tenants, the Extension of Security of Tenure Act, child maintenance, family violence, labour, and other claims arising under the Constitution and new legislation.<sup>32</sup> These included issues that many paralegals and advice offices were already involved in. Legal aid assistance, however, remained restricted to representation from the organised profession (advocates and attorneys).

These developments make it evident that an extension of the range of legal aid services is needed, and that available services and infrastructure is limited and urban biased.

### **Legal Aid services – Judicare and other models**

To facilitate legal aid service delivery a referral (Judicare) system remunerates legal practitioners for their work on the basis of an agreed fee. The bulk of legal aid services have been delivered through this model, which has been extremely expensive to implement and difficult to monitor and evaluate. Many people consider the service to be of inferior quality and are mistrustful of State legal assistance.

Several initiatives to diversify the delivery of legal services have been undertaken by the LAB. One such initiative involves arrangements with a number of Universities (starting with 5 in 1994 to 22 in 2000) to provide services through legal aid clinics staffed by candidate attorneys under the supervision of attorneys. The success of these clinics varied, but by and large the initiative proved that a significant number of legal aid services could be delivered at a considerably cheaper rate than through the Judicare model.

In 1995 the LAB entered into an agreement with Lawyers for Human Rights to establish a pilot project in the Overberg region of the Western Cape. The LAB underwrites the employment of candidate attorneys with private attorneys in several rural towns to do legal aid work. These candidate attorneys also provide back-up services to several advice offices that are currently financed by DANIDA. A similar partnership has been initiated with LHR's Karoo office.

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<sup>30</sup> Legal Aid Board Annual Report 1994/95, p. 34.

<sup>31</sup> 2000 National Expenditure Survey – Chapter 23 – “Justice and Constitutional Development”, p. 178.

<sup>32</sup> Legal Aid Board Business Plan, 2000–2003, p. 2.

The LAB has also established a Public Defender (PD) office in Johannesburg, with a satellite office in Soweto. The need to enhance the existing PD service through improved outreach services, and its potential role in co-ordinating private practitioners involved in legal aid defence, were recognised by the LATT. The LATT also recommended that “public defender officers should appoint paralegals to undertake statements, affidavits, consultations with prisoners and investigations.”<sup>33</sup>

Towards the end of 1999 and in protest against the dramatic reduction in Judicare fee tariffs, legal practitioners in Kimberley ‘downed tools’ and refused to take on any legal aid cases. The LAB responded by establishing the Kimberley Justice Centre with a Director who oversees the work of a number of candidate attorneys and professional assistants (attorneys who have the right of appearance, but have not practised for longer than five years). The Centre will link up with other service providers (NGOs and advice offices) in surrounding districts. The Centre has yet to work out a protocol for interaction with these non-governmental institutions.

### **LAB – financial mismanagement and administrative chaos**

By 1994 it has become clear that the LAB was losing control over its spending. In addition to being understaffed and under-resourced, financial and administrative mismanagement, leading to a massive backlog in the payment of accounts, made the situation worse. In 1998 the LATT recommended that the LAB be reconstituted along more representative lines. Steps were taken to change the leadership of the Board (including representation by the NCBPA), and to crack down on financial mismanagement, maladministration, and corruption.

Controlling the budget, however, remained of paramount importance. In August 1999 the LAB estimated that their contingent liabilities (money owed on outstanding matters for which the LAB had issued instructions) by 31 March 2000 would be approximately R600 million. This was untenable, as the LAB faced bankruptcy unless action was taken to reduce legal aid costs. Consequently, services were cut and strict administrative measures were introduced. In addition the tariff for Judicare cases was drastically reduced (from R1000-1800 per day to R750), the categories entitled to legal aid were limited and a more disciplined adherence to the means test was introduced.

Plans to phase out Judicare and establish Justice Centres countrywide were not followed through, because the research on which the needs assessment was based was limited, and the Department of Finance was unwilling to fund 600 positions needed to staff these centres. The Department of Finance refused to support any significant transformation processes until the LAB sorted out its financial and administrative systems, and provided a clear plan of action that would lead to a reduction in costs and an expansion of the service. As a result the transformation of the legal aid system was halted. With the exception of ad hoc initiatives, such as the establishment of a Justice

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<sup>33</sup> “Report and Recommendations of LATT to the LAB” op cit, p. 8.

Centre in Kimberley, until May 2000 there was no significant development in transforming legal aid, and in integrating paralegals into the system.

A LAB Business Plan for 2000/01, with projections until 2002/03 was presented to the Public Accounts Committee at Parliament in May 2000. Cost cutting measures had reduced contingent liabilities by over R300 million and LAB projections indicated that liabilities would continue to fall as a result of the combined effect of reduced fees, contraction in services and more efficient administrative systems. The LAB Chairman felt that they had turned the corner in terms of addressing the crisis precipitated by uncontrolled spending, and was optimistic that the backlog of outstanding commitments ought to be eliminated by the end of 2000.

To a certain extent the Plan addressed criticisms regarding the lack of transformation and the failure to outline how the LAB would implement the recommendations to reduce its dependency on Judicare. The Business Plan sets out the intention to establish 35 Major Justice Centres and a further 14 Minor Justice Centres, between 2000 and 2003, starting with seven centres (five major and two minor) during the current financial year.<sup>34</sup> These centres will provide a 'one stop' service for legal aid clients and will incorporate the different constituents of the present legal aid scheme and legal profession under one roof: advocates, attorneys, candidate attorneys, paralegals and administrative staff. Although the LAB's Kimberley Centre provides an idea of what a justice centre could look like, it has yet to develop all the components envisaged in the plan.

In addition, the LAB set out its intentions to develop some form of internship programme for the Justice Centres, and to lobby government and the legal profession in this regard. The LAB also plans a telephone call centre to provide a legal consultation service for detained persons and the general public. Although the LAB made no commitment regarding the extension of the Overberg project, this and the Karoo initiatives with LHR, are referred to in the Business Plan. It was also pointed out that the Board was willing to enter into co-operative agreements with NGOs and that it was in the process of inviting NGOs to submit innovative proposals for the delivery of legal aid. Another area of development involves extending the co-operation with legal aid clinics.

With regard to the paralegal sector, the Business Plan states that the LAB is "willing to consider involving paralegals in the delivery of legal services to the poor", and that discussions and negotiations are ongoing in this regard.<sup>35</sup> The Plan does not specify what this will entail, and what sort of assistance will be provided or contracted by the LAB to the range of envisaged services. Some interviewees commented that the LAB currently has a narrow legal aid focus and that the Business Plan represents a step backwards compared to what was envisaged at the National Legal Aid Forum. Significantly there has been no development regarding the introduction of new legislation governing legal aid, or changes to the existing legal aid guide, which retains a narrow focus. In the course of the interview process, C A S E was informed that

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<sup>34</sup> Legal Aid Board Business Plan, 2000–2003, Annexure "K".

<sup>35</sup> *ibid.*

there is a possibility that the LATT will be revived to assist with the development of a new legal aid guide. With regards to legislation, however, some interviewees favour a completely new Act, and others favour amendments to the existing legislation.

### **Legal aid – who benefits?**

During the last 28 years, almost one million legal aid cases have been referred to private attorneys, the vast majority involving criminal matters. In the last decade, the number of cases handled by the LAB increased from 24,281 in 1989/90 to 210,927 in 1998/99, though the figure fell down to 148,519 in 1999/2000, due to the exclusion of civil cases.<sup>36</sup> In spite of this increase, significant numbers of South Africans remain unaware of the provisions contained in the Bill of Rights regarding legal representation at State expense. A third of respondents in a national survey conducted in 1998 were unaware of this right. This figure rose to over 40 % in rural areas.<sup>37</sup> Increased expenditure on legal aid has generated negative perceptions that taxpayers' money is utilised to 'protect criminals', and that criminals had 'too many rights'.

Although there is no threat to the constitutional provision for providing legal aid at State expense for those facing criminal charges, "if substantial injustice would otherwise result"<sup>38</sup>, the diversification of legal aid services would help to stem this type of criticism.

No definition of an 'indigent person' is provided for in the Legal Aid Act, but the LAB has introduced a means test, which allows for a ceiling of R600 per month for single persons, R1200 for married couples, plus R180 per child.<sup>39</sup> The LAB has recently instituted controls to ensure that officials adhere closely to the means test.<sup>40</sup> Although the LAB's director can grant legal aid to persons who do not qualify, several interviewees raised concerns about the number of people who are refused legal aid on the basis that they earned too much in terms of the means test, but not enough to engage an attorney privately.

Services have been delivered primarily in metropolitan and urban areas. According to the LAB's acting CEO, many magisterial districts have very limited or no legal aid services. Rural areas are worst affected, particularly those in former homelands and self-governing territories. The reduction in Judicare fees has (at least in the short term) compounded this situation, and precipitated several crises, as fewer lawyers are now prepared to act on LAB instructions. The LAB's plan to extend its services through Justice Centres, contractual arrangements, and other measures, is a welcome development. Concerns have been raised, however, that the new centres (at least in the preliminary stages) will not adequately address needs, particularly in the rural

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<sup>36</sup> LAB Business Plan, op cit, p. 2.

<sup>37</sup> "Assessing Levels of Human Rights Awareness amongst the general population and specified target groups – Executive Summary", Piers Pigou, Ran Greenstein and Nahla Valji, November 1998, C A S E, p. 10.

<sup>38</sup> Section 35 (2) (c), Chapter 2, The Constitution, Republic of South Africa, Act 108 of 1996.

<sup>39</sup> "The Delivery of Civil Legal Aid Services in South Africa" – David McQuoid Mason, unpublished paper, 29 March 2000.

<sup>40</sup> LAB Business Plan, op cit pp. 7-8.

areas.<sup>41</sup> There are also concerns that the LAB has developed inflated expectations regarding the types and extent of services that can be provided by the NGO sector.

### Legal aid and paralegals

Since the January 1998 National Legal Aid Forum, the NCBPA has focused its attention on legal aid transformation. Not all paralegal organisations share this viewpoint and several interviewees, including paralegals, emphasised their concerns that the NCBPA's expectations are inflated. Paralegals and advice offices have benefited, directly or indirectly, from the legal aid system only to a limited extent. With the exception of a one-off grant to the Legal Aid Bureau in Johannesburg in 1998, no other paralegal organisation has received direct funding from the LAB.

Although the LAB Business Plan represents a step in the right direction, it offers no immediate opportunities for paralegals and advice offices, though in the medium to long term it is envisaged that more than 100 paralegals will be incorporated into Justice Centres infrastructure. Further arrangements along the lines of the Overberg and Karoo model are being sought<sup>42</sup>, and they offer opportunities for the incorporation of advice offices into mainstream legal work.

The National Forum and NAP agreed that legal aid should be expanded to include advice giving, dispute resolution, legal education and human rights awareness, though the LAB has retained a narrower focus on its constitutional mandate. In its letter to the NGO sector the LAB argued that: "Priority must be given to fulfilling the constitutional imperative and we trust that this will be borne in mind when formulating your proposal if you wish to participate. However, representation in land matters, gender issues and the representation of children is also of paramount importance to the Board."<sup>43</sup>

The NCBPA retains a focus on the provision of legal services without defining the scope of the services. Most interviewees feel it does *not* cover services such as assistance with social welfare and labour matters, and community education, which are currently provided by advice offices. The dilemma faced by the paralegal movement is how to become more professional (through training and accreditation), and thus benefit from the opportunities offered by the LAB. This, without losing touch with the basic needs of the communities that they serve, which include labour, welfare, and other non-legal matters, and which the State is unlikely to fund. The danger here is that the benefits of incorporation will be reserved for a small elite of paralegals, who are equipped to provide limited services, leaving behind the bulk of community based advice offices.

The NCBPA should focus on developing a clear set of proposals on exactly what services should be provided by advice offices (and by paralegals), and which of these should be financed through the legal aid system. Where possible, these proposals should incorporate a cost benefit analysis

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<sup>41</sup> See also "New steps to cut legal costs" – Barry Streek, *Mail & Guardian*, May 26 to June 1 2000.

<sup>42</sup> Letter to NGOs, entitled "Access to Justice: Expanding Legal Service Delivery", from LAB, dated 26 May 2000.

<sup>43</sup> Ibid.

of the proposed service and be framed within the context of Constitutional obligations and NAP commitments. There is clearly room for debate on the issues, and in this regard the NCBPA and the paralegal movement in general should seek support from other sectors of civil society to lobby and advocate for a broad interpretation regarding service provision.

## **TRANSFORMATION OF LEGAL AID AND INCLUSION OF PARALEGALS**

Central to the transformation process is the inclusion of paralegals in a broader framework of legal service provision. Unequal access to justice is produced and exacerbated by many factors, including the cost of legal services and limited State funds available for free legal aid to the needy. Paralegals frequently are the only providers of legal advice in remote and poor rural communities and they play a crucial role in extending cost-effective legal services.

Having initially supported the development of legislation to regulate the work of paralegals as a specific entity, the NCBPA through the NPI is currently advocating their inclusion within the same legislative and regulatory framework that governs the established legal profession. The envisaged Legal Practitioners Act would, for the first time, regulate the work of paralegals and provide them with the recognition the need to enter into the kind of contractual relations under consideration by the LAB. The process of developing this legislation has been slow, though there have been some significant developments. In November 1999, paralegals formally participated for the first time in discussions initiated by the Department of Justice on the transformation of the legal profession. Consensus was reached among key stakeholders that paralegals should be included within the new legislative framework, though a number of contentious issues (the definition of a paralegal, the mechanisms and controls to ensure accountability and professional standards) remain. In many respects the hard bargaining around these issues has yet to happen.

A Legal Practitioners Bill is currently being drafted by the Policy Unit at the Department of Justice. It will be published for public comment in the coming weeks, and it is expected that legislation will be passed in the first quarter of 2001 at the earliest. There remains a reluctance on the part of the established profession to accommodate paralegals.<sup>44</sup> There are also a number of valid concerns regarding aspects of professional practice, which have to be regulated in the public interest. These include:

- Standards of education and training
- Qualification for admission to the profession
- Licence to practice
- Discipline in respect of improper practice
- Indemnity in respect of the misappropriation of funds

It has been proposed that a statutory body should be created to control these aspects for the entire legal profession, not merely for paralegals. One of the thornier issues relates to the supervision of

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<sup>44</sup> "Sectoral Study on Legal Assistance and Access to Justice" – Professor Shadrack Gutto, CALS, University of the Witwatersrand, 22 May 2000, p. 4 (Report commissioned by the European Union Delegation in South Africa).



paralegals. The LATT noted that paralegal advice offices “need training and supervision by qualified legal practitioners.”<sup>45</sup> The NPI recognised that, but pointed out that there are many aspects of their work that do not need any input from lawyers. The question of supervision therefore appears to be directly related to the nature of services that will be provided.

The passing of legislation and creation of a regulatory framework governing the work of the paralegal sector is a pre-requisite for the development of formal relations between the LAB (and other statutory bodies or government departments) and paralegals. The NPI, which is developing the paralegals position, cannot dictate the pace at which this process evolves. It is yet to finalise its position regarding the legislation and has been urged to do so by the Department of Justice.

There does not appear to be a consensus regarding a number of the ‘hard issues’, and negotiations with other sectors of the legal profession have not moved forward sufficiently, despite undertakings that efforts would be made in this regard. It remains to be seen what can be achieved in this process, and to what extent will the incorporation of paralegals include the broad spectrum of paralegals and community based advice office workers.

## FUNDING AND SUSTAINABILITY

After several years of sustained financial support for community based advice offices and related activities by the donor community, it is evident that support from the international community in this field will decline over the next three to five years. SIDA/ICJ-S have made it clear that they will gradually decrease their support from the beginning of 2001. The EUFHR is expected to continue (and possibly expand) its support under a new financial agreement to be finalised at the beginning of 2001. Although the Foundation's sole funder – the EU – has apparently expressed a desire to scale back its operations in this area, the recent programme evaluation has recommended continuing and consolidating support in the area. Funding is therefore likely to continue for the next few years, but not beyond that.

Levels and types of donor support vary considerably, contributing to varying levels of capacity among offices. Several donors, such as the EUFHR and Transitional National Development Trust (TNDT) have funded advice offices directly. Others, such as the SIDA/ICJ-S and USAID prefer to provide funding through umbrella organisations (NCBPA and NIPILAR respectively), and consequently do not have a close relationship with individual advice offices.

Several interviewees expressed their preference for a more direct approach, pointing out that the use of a funding channel may inhibit individual offices from developing their capacity to raise funds and improve their reporting and accountability. Conversely, others have argued that the third party approach has been effective, as evidenced by the multi-million Rand support secured by the NCBPA from SIDA/ICJ-S. Careful consideration should be given to assessing what approach works and what does not.

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<sup>45</sup> “Report and Recommendations of LATT to the LAB” 21 November 1998, p. 9.

Donor funding has been characterised by lack of co-ordination between donors and their South African partners. Although key donors agree that they need to talk to each other, they cannot be expected to take sole responsibility for co-ordinating efforts to support the paralegal movement. The NCBPA and other players in the movement must play a role in ensuring that all role-players are informed of the various processes and initiatives in order to facilitate a dialogue.

The NCBPA was established with the objective of developing a coherent strategy to ensure that the paralegal movement and its constituent parts survive – in the short term through continued funding, and in the medium to long term through local funding. In this regard considerable success has been achieved through donor support, but more is needed to pay for the capacity building required by many advice offices (as well as their management committees).

Even without a comprehensive overview of all community advice offices, it is evident that organisational development and capacity building remain critical areas in need of support. In the context of diminishing donor funding for running costs, and the need to develop and market paralegal and advice office services with the LAB and various government departments, careful consideration should be given to prioritising support in this area. This is especially the case as the State is unlikely to pick up the entire bill from international donors, once the latter reduce their support. This applies in particular to support for functions that are not considered to be legal work, as currently and narrowly defined.

Support for the NCBPA's provincial operations is clearly insufficient. Provincial offices are poorly resourced and their potential impact is reduced at a time when their role in facilitating communication, co-ordination and back-up is becoming increasingly important. The limited funding might force the NCBPA to make some hard decisions to ensure that provincial operations receive sufficient resources in the short term.

Another area of critical importance is the need for increased support for training, to ensure that paralegals and advice offices become a recognised part of the legal system. Although the development of a two-year diploma course will provide paralegals with accredited qualifications, it is not clear how most advice office workers will be able to attain these qualifications and where the funding will be obtained to pay for this.

Paralegals will be able to sell a range of services within the ambit of a transformed legal aid system administered by the LAB, and a number of them will be able to find employment within the envisaged Justice Centres. However, while the 1998 National Legal Aid Forum and National Action Plan opened the possibility of support for a wide range of activities (including education, mediation and advice services), current State thinking appears to be moving in the direction of a considerably narrower focus, at least in the foreseeable future.



In the light of limited developments in the legal aid field, the NCBPA May 2000 AGM recognised the need to diversify its approach to sustaining the movement and its constituent members. The AGM resolved to “engage in a major drive for financial resources to secure its sustainability. A committee will be set up for this purpose with short, medium and long term strategic (foci). It will focus on potential recourse options within the public, foreign charitable and private sectors.”<sup>46</sup>

Specialist paralegal organisations such as the Black Sash are unlikely to pursue a route that would make them dependent on state subsidies or on a third party such as the NCBPA. This type of independence and self-sustainability should be encouraged. The establishment of a NCBPA Sustainability Committee is an important development, which should be complemented by a comprehensive examination of advice offices’ capacity to generate support and funding.

In the course of the research process a number of potential avenues of support were mentioned. The National Development Agency (NDA), a statutory body that has taken over from the TNDT, is a crucial potential source of support. The primary objectives of the NDA are to contribute to the eradication of poverty and its causes, and to strengthen the capacity of civil society organisations in combating poverty. The NDA can play a role in the much-needed development and capacity building required by advice offices to enable them to engage the LAB, State departments and other potential sources of support.

As the NCBPA has focused most of its efforts within the legal aid paradigm, not enough attention has been given to finding alternative sources of support from the State. In addition to Justice, many government departments (Welfare and Population Development, Labour, Housing, etc.) should have an ‘access to justice’ line item in their budgets<sup>47</sup>. The Justice Department which retains a pivotal role is mooted the idea of establishing a unit that would take responsibility for ‘community legal services’, thereby providing a potential home outside of the LAB for sourcing further support to the advice office movement.

Several interviewees noted the potential of local government support. In the United Kingdom and Australia, for example, local councils provide subsidies and underwrite running costs of Citizen Advice Bureaus and community law centres respectively. The transformation and development of South African local government is at its inception. The NCBPA reports that several member offices have secured support through the provision of free or subsidised rent for premises. This support has not been extended to providing funds for running costs and salaries.

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<sup>46</sup> “Brief on the outcome of the NCBPA AGM” – unpublished NCBPA letter to *De Rebus*, 2 June 2000.

<sup>47</sup> The development of Multi-Purpose Community Centres (MPCC) provides a further possibility for creative partnership between paralegals and the State. The first MPCC was established in Sebokeng, in the Vaal Triangle in November 2000. The MPCC is an initiative of the Government Communication and Information Service and is intended to give communities better access to services and government information, and acts as a one-stop centre, which brings together government, community based and non-governmental organisations. Government plans to establish a number of MPCCs countrywide. (See Gauteng News, No.6, December 2000)

The NCBPA must secure support for local government involvement, as well as encourage further approaches at local level. Similar initiatives should be considered at a provincial level.

Another source of potential support is the Poverty Relief Fund (PRF). With over R1.2 billion allocated for the 2000/01 financial year, and an expected R1.5 billion in 2001/02, the PRF is key initiative to address poverty. Recent revelations that some government departments have failed to spend funds allocated from the PRF have placed pressure on the government to find appropriate ways to utilise the available money. Several interviewees, including representatives of the Justice Department felt that advice offices would be an appropriate beneficiaries of PRF funding, as this would fulfil the key criteria of targeting indigent and other marginalised groups, as well as providing employment. A lack of internal communication within the Department, however, has resulted in the expiry of the deadline for proposals to the Finance Department for projects in the 2000/01 budgetary year. Consequently, the opportunity to develop detailed plans and proposals for the next financial year now presents itself.

## **CONCLUSION – OPPORTUNITIES AND CHALLENGES**

Although the NCBPA has made considerable progress in achieving its key objectives, it is still in its early days. It has been hampered in this process by a mixture of internal difficulties and external factors. These achievements must be recognised, but there still is a long road ahead that requires continued sacrifices and the commitment of the NCBPA and its constituent parts.

Given the available funds and human resource capacity, it is unrealistic to expect the Association to deliver effectively in all its target areas. Politically, the potential of the paralegal movement is recognised. Expectations that the transformation and integration of advice offices can be achieved on the basis of existing donor funding must be addressed. In short, there must be a significant investment in the process at this critical juncture, if it is to succeed.

Progress, however, is not solely dependent on financial resources. The NCBPA and the paralegal movement need to develop a coherent position on a range of policy fronts. Two interrelated issues stand out as being of critical importance. The first relates to core NPI line functions outlined above – the development of accredited training and certification, the code of ethics and the paralegal position in relation to the envisaged Legal Practitioners' Act. The second relates to opportunities arising from legal aid transformation and the apparent need to diversify funding support for the continued development and long-term sustainability of the movement.

The NCBPA May 2000 AGM came at a critical time for the paralegal movement. The current situation presents the paralegal movement with both challenges and opportunities. The AGM identified a number of critical areas around issues of sustainability, organisational development, and policy. Some of these issues have also been identified in the course of this research. The following are some additional areas that require urgent attention by the NCBPA and other stakeholders.

- The NCBPA should prepare a public response to the LAB Business Plan and present an explicit position on legal aid and paralegals. This will help consolidate the role of paralegals and in particular community based advice offices in the development of access to justice and legal aid transformation.
- The NCBPA must take a clear stand on which advice office services should be incorporated within a transformed legal aid service. Although a number of services fall outside the constitutional imperatives outlined by some interviewees, the NCBPA should build on the consensus reached in 1998, namely that legal aid should include services such as mediation, human rights education, etc. Clarity on what services can be contracted will assist in the identification of training priorities.
- The NCBPA should establish a more decentralised structure and ensure that provincial offices are adequately funded to enable them to play an effective role in co-ordination, information dissemination, and support. This may require a re-allocation of resources in the absence of additional funding.
- The NCBPA should undertake a comprehensive assessment and audit of paralegals and advice offices to provide a basis for developing clusters countrywide. In the light of the skills audit research, it is recommended that this assessment be outsourced to a competent agency. If the existing skills audit process does not produce the required results, it would be possible to incorporate this aspect within a broader evaluation.
- The NCBPA, in co-operation with the NPI should identify, gain access to and distribute relevant information, training and resource material to its constituent members. Although a considerable amount of valuable material has been developed in the course of the last few years, many advice offices have not received copies, or been made aware of their existence.
- A number of interviewees, including representatives of the paralegal movement, have argued that the movement must 'get its act together', and advocate and lobby for its position more clearly with government (business plans, contractual arrangements, etc). Various processes such as the skills audit and case-logging are intended to facilitate this process.
- The critical issue of professionalism and accountability must be pursued with renewed vigour, in order to address the concerns of both critics and supporters of the movement, and in order to assist the integration and training development process.
- There is agreement that there is a role for paralegals and advice offices in the development of access to justice. This argument has been won. What remains to be decided is exactly what that role will be, how it can be sustained and developed, and to what extent will the State take responsibility for supporting it. As many interviewees have pointed out, it is essential that the paralegal movement articulate clearly what role it can play, not only with regards to

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the legal protection of rights, but also in terms of the broader objectives of strengthening democracy and development. The proximity of advice offices to the communities they serve provides a powerful potential asset to facilitate the participatory approach required in the development of a human rights culture in South Africa.

**ANNEX 1: PERSONS INTERVIEWED**

- Ms. Fran Biggs, independent consultant
- Professor Shadrack Gutto, Centre for Applied Legal Studies, University of the Witwatersrand, Chairperson of the Legal Aid Transformation Task Team, Chairperson of the National Paralegal Institute
- Mr. Glenn Farred, Cluster Co-ordinator, National Community Based Paralegal Association, Johannesburg
- Mr. Derrick Fine, independent consultant, Cape Town
- Ms. Chery Gillwald, Deputy Minister of Justice, Pretoria
- Mr. Vinodh Jaichand, National Director, Lawyers for Human Rights, Pretoria
- Ms. Vanya Karth, co-ordinator of the “Overberg Project”, Lawyers for Human Rights, Stellenbosch
- Ms. Phillipa Kruger, Access to Justice Department, Legal Aid Board, Pretoria
- Ms Pauline Lipson, former Director, Legal Aid Bureau, Johannesburg
- Prof. Cheryl Loots, Policy & Planning Unit, Ministry of Justice, Pretoria
- Ms Pinki Madlala, Paralegal Co-ordinator, Legal Resources Centre, Johannesburg
- Mr. Musa Madonsela, Acting Chief Executive Officer, National Institute for Public Interest Law and Research, Pretoria
- Mr. Peter Manda, Director, National Paralegal Institute, Johannesburg
- Mr. Martin Monyela, Secretary General & Chief Executive Officer, National Community Based Paralegal Association, Johannesburg
- Mr. Wiseman Mshayisa, Director, Johannesburg Community Law Centre
- Justice Mohammed Navsa, Chairman, Legal Aid Board
- Adv. Anthony Osler, Lawyers for Human Rights, Karoo Office
- Mr. Vusi Pikoli, Director General, Department of Justice, Pretoria
- Mr. Sam Present, Advice Office Fieldworker, European Union Foundation for Human Rights, Pretoria
- Ms. Asha Ramgobin, Association of University Legal Aid Institutions, Legal Aid Board member
- Justice Albie Sachs, Constitutional Court, Johannesburg
- Ms. Lucretia Seafeld, Project Officer, European Union Foundation for Human Rights, Pretoria
- Ms. Khosi Sibeko, Director, Black Sash Advice Office, Cape Town
- Ms. Alison Tilley, Black Sash, Cape Town
- Ms. Anthea van den Berg, Lawyers for Human Rights, West Coast Officer.
- Andre van Vuuren, Chief Executive Officer, Law Society of South Africa, Pretoria